

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

MARVINA MINCY, Individually and as Parent and Guardian,	:	APPEAL NO. C-081032 TRIAL NO. A-0704107
	:	
JACKIE SANDERS,	:	<i>OPINION.</i>
	:	
JA'RICO SANDERS, A MINOR CHILD,	:	
	:	
and	:	
	:	
JAY SANDERS, A MINOR CHILD,	:	
	:	
Plaintiffs-Appellants,	:	
	:	
vs.	:	
	:	
KENNETH FARTHING,	:	
	:	
Defendant-Appellee,	:	
	:	
and	:	
	:	
SAFE AUTO INSURANCE COMPANY,	:	
	:	
Defendant.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: October 2, 2009

Randy A. Byrd and the *Law Offices of Blake R. Maislin, LLC*, for Plaintiffs-Appellants,

Charles F. Hollis, III, and *Benjamin, Yocum & Heather, LLC*, for Defendant-Appellee.

Note: We have removed this case from the accelerated calendar.

CUNNINGHAM, Judge.

{¶1} Plaintiffs-appellants Marvinna Mincy, Jackie Sanders, Ja'rico Sanders, and Jay Sanders appeal from the trial court's grant of summary judgment for defendant-appellee Kenneth Farthing in a negligence action. For the reasons that follow, we reverse and remand for further proceedings.

{¶2} This case arises out of two single-vehicle accidents that occurred around 4:30 a.m. on eastbound Interstate 275 in Springdale, Ohio. The conditions at that time were dark and foggy with light rain.

{¶3} The first accident occurred when Farthing lost control of his Honda Accord after hitting a pool of water while passing a garbage truck. Farthing's Accord skidded to the left, struck the concrete median wall twice, and then flipped and skidded to a stop on the highway, thereby partially blocking the two left lanes.

{¶4} Farthing suffered only a scrape on his forehead and was able to crawl out of his Accord. He claimed in his deposition that he did not turn off the Accord's lights or take the Accord's keys with him. After exiting from the Accord, Farthing first stood in the emergency lane but then moved onto the grassy strip on the other side of the concrete median. There Farthing called his wife on his cellular phone. His conversation was interrupted by sirens followed by the squeal of tires.

{¶5} The second single-vehicle accident occurred shortly thereafter. Mincy, driving a Ford Escape and travelling eastbound on I-275 in the far left lane, approached Farthing's disabled Accord. She claimed that she did not notice the Accord in her way until her headlights "hit" it. She immediately slammed on her brakes and, concerned that someone was inside the Accord, veered to the left to avoid hitting it. She claimed that she could not maneuver to the right because

another vehicle was there. Her Escape struck the median wall, causing damage to the driver's-side front quarter panel and deflating the front left tire. Emergency personnel replaced the damaged tire with a spare. Mincy drove to the hospital with Jackie Sanders, her boyfriend, and Ja'rico and Jay Sanders, their children, who were passengers in her Escape.

{¶6} Mincy testified in her deposition that the disabled Accord's lights were not operating. Additionally, she said that she had been travelling at about 50 to 55 m.p.h. when she first saw the Accord. Jackie Sanders agreed with this estimate in his deposition testimony.

{¶7} Mincy and the Sanderses filed a negligence suit against Farthing, also naming as defendants Mincy's automobile insurance carrier, State Auto Insurance Company. State Auto filed a cross-claim against Farthing. Farthing moved for summary judgment against Mincy, the Sanderses, and State Auto. The trial court granted summary judgment to Farthing. This appeal followed.

{¶8} In his motion for summary judgment, Farthing argued that he was not liable for the plaintiffs' damages as a matter of law based upon two alternative theories. First, he claimed that he had not breached any duty of care that he had owed to the plaintiffs. Second, he claimed that even if he had breached a duty, this breach was not the proximate cause of the plaintiffs' injuries because Mincy's own negligence in violating the assured-clear-distance statute constituted an intervening, superseding cause of the plaintiffs' injuries that had broken the chain of causation set in motion by his acts.

{¶9} The trial court did not specify which theory it had relied upon in granting summary judgment to Farthing. But Farthing concedes on appeal that he

did owe a duty of care to the plaintiffs and that a genuine issue of material fact existed as to whether he had breached this duty. He maintains, however, that this factual dispute was irrelevant because the plaintiffs could not establish an essential element of their claim—that his negligence had proximately caused their injuries—because Mincy’s violation of the assured-clear-distance statute was an intervening, superseding cause of the plaintiffs’ injuries.

Standard of Review for Summary Judgment

{¶10} Summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, with that party being entitled to have the evidence construed most strongly in his favor.¹ The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party’s claim.² If the moving party satisfies its burden, the nonmoving party may not rest upon the mere allegations or denials of the pleadings, but that party’s response, by affidavit or as otherwise provided in the rule, must set forth specific facts showing that there is a genuine issue for trial.³

{¶11} To meet the standard for summary judgment on the issue of proximate cause, Farthing was required to show the absence of a genuine issue of fact as to whether (1) Mincy had violated the assured-clear-distance statute, and (2)

¹ Civ.R. 56(C).

² *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 1996-Ohio-107, 662 N.E.2d 264.

³ Civ.R. 56(E).

that violation was the sole cause of the plaintiffs' injuries. We review the trial court's grant of summary judgment de novo.

Assured-Clear-Distance Statute

{¶12} The assured-clear-distance statute, R.C. 4511.21 (A), states that “no person shall drive any motor vehicle * * * in and upon any street or highway at a greater speed than will permit the person to bring it to a stop within the assured clear distance ahead.” A violation of this statute is negligence per se.⁴

{¶13} The Ohio Supreme Court has consistently held that a driver violates the assured-clear-distance statute as a matter of law if the party invoking the statute presents uncontroverted evidence that the driver collided with an object that (1) was ahead of him in his path of travel, (2) was stationary or moving in the same direction as the driver, (3) did not suddenly appear in the driver's path, and (4) was reasonably discernable.⁵

{¶14} Farthing, citing this standard, argues that Mincy violated the statute because his Accord was ahead of her in her path of travel, was stationary, did not suddenly appear in her path, and was reasonable discernable. But we find Farthing's argument unavailing.

{¶15} A strict application of the standard is inappropriate in this case because Mincy did not collide with Farthing's Accord. Case law has recognized, however, that the assured-clear-distance statute is primarily a speed statute and that a collision with a reasonably discernable object is not a requirement in all cases.⁶ We conclude, in accordance with these cases, that the statute may be violated where a

⁴ *Pond v. Leslein*, 72 Ohio St.3d 50, 53, 1995-Ohio-193, 647 N.E.2d 477.

⁵ Id. at 52, citing *Blair v. Goff-Kirby Co.* (1976), 49 Ohio St.2d 5, 7, 358 N.E.2d 634.

⁶ *Shooter v. Perella*, 6th Dist. No. L-07-1066, 2007-Ohio-6122, ¶13, citing *Coy v. Sieminski* (Apr. 18, 1980), 6th Dist. No. L-79-316; *Pearson v. Lacy* (Apr. 30, 1980), 1st Dist. No. C-790197.

driver has an accident after taking evasive action to avoid a collision with an object that (1) is ahead of him in his path of travel; (2) is stationary or moving in the same direction as the driver; (3) has not suddenly appeared in the driver's path; and (4) is reasonably discernable. We apply this modified standard to evaluate Farthing's argument.

{¶16} Mincy alleged that she had struck the concrete divider after taking evasive action to avoid a collision with Farthing's Accord, and she concedes on appeal that the Accord was ahead of her in her path of travel, was stationary, and did not suddenly appear in her path. But she argues that the Accord was not reasonably discernable and therefore that she did not violate the assured-clear-distance statute.

{¶17} Although an analysis of Mincy's conduct under R.C. 4511.21(A) is appropriate, we hold that there is conflicting evidence in the record on whether Farthing's Accord was "reasonably discernable." Thus, there was no negligence per se as a matter of law, and summary judgment was therefore erroneously granted.

{¶18} Whether an object is "reasonably discernable" under a given set of circumstances is ordinarily a question of fact, and when reasonable minds can reach different conclusions from the evidence presented upon the question, the trial court should not decide the case as a matter of law.⁷ While the "reasonable discernability" of an object on the highway during daylight hours is rarely an issue,⁸ it is likely an issue when the accident occurs during nighttime hours.⁹ In this case, the collision took place on the highway at night in foggy conditions, and the evidence was in dispute as to whether the Accord was illuminated. Mincy testified that there were no

⁷ See *Blair v. Goff-Kirby Co.* (1976), 49 Ohio St.2d 5, 358 N.E.2d 634, syllabus.

⁸ *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 506 N.E.2d 212, paragraph two of the syllabus.

⁹ *Sharp v. Norfolk & W. Ry. Co.* (1988), 36 Ohio St.3d 172, 522 N.E.2d 528, syllabus.

lights on the disabled vehicle; Farthing testified that he had not turned off the lights and had left the keys in the Accord after he had exited from the vehicle. Construing the evidence most favorably to Mincy and the Sanderses, we hold that reasonable minds could differ as to whether the Accord was “reasonably discernable,” and thus, the “reasonable discernability” of the Accord remains a question of fact for the trier of fact to determine.¹⁰

Causation

{¶19} We also disagree with Farthing’s argument that Mincy’s alleged violation of the assured-clear-distance statute would have necessarily broken the chain of causation. To the contrary, while a violation of the assured-clear-distance statute is negligence per se, this means only that the driver has breached a duty of care; the statutory duty has simply replaced the common-law duty of ordinary care.¹¹ A statutory violation does not alone resolve the issue of liability for the plaintiffs’ injuries.¹² Whether an actor’s negligence per se is a contributory cause or an intervening, superseding cause of an injury is generally an issue for the trier of fact.¹³ In this case, genuine issues of material fact remain as to both the negligence of Farthing and Mincy and the proximate cause of the plaintiffs’ injuries.

Conclusion

{¶20} We conclude that the trial court erred by granting summary judgment to Farthing. Therefore, we sustain the assignment of error, reverse the trial court’s judgment, and remand this case for further proceedings.

Judgment reversed and cause remanded.

¹⁰ See *Sharp*, supra; *Junge v. Brothers* (1985), 16 Ohio St.3d 1, 475 N.E.2d 477.

¹¹ *Spaulding v. Waxler* (1965), 2 Ohio St.2d 1, 5, 205 N.E.2d 890.

¹² See *Blair*, supra.

¹³ See *Smiddy* at 40; see, also, *Junge*, supra.

HENDON, P.J., and HILDEBRANDT, J., concur.

Please Note:

The court has recorded its own entry on the date of the release of this decision.